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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 1046.

PEOPLE OF THE STATE OF ILLINOIS ex rel. GEORGE MUSSO, Madison County Treasurer and Ex-Officio Collector of Taxes of Madison County, Illinois,
Appellants,
vs.
CHICAGO, BURLINGTON AND QUINCY RR. CO., CHICAGO & NORTHWESTERN RR. CO., GULF, MOBILE AND OHIO RR. CO., CHICAGO AND EASTERN ILLINOIS RR. CO., ILLINOIS CENTRAL RR. CO., NEW YORK CENTRAL RR. CO., NEW YORK, CHICAGO & ST. LOUIS RR. CO., WABASH RR. CO., PENNSYLVANIA RR. CO., ILLINOIS TERMINAL RR. CO., ALTON & SOUTHERN RR. CO., and TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Appellees.

On Appeal from the Supreme Court of Illinois.

MOTION TO DISMISS OR AFFIRM.

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Appellees.

On Appeal from the Supreme Court of Illinois.

MOTION TO DISMISS OR AFFIRM.

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move to dismiss these appeals or to affirm the judgment of the Illinois Supreme Court, for the following reasons:

1. They do not question the validity of any statute of any state on the grounds of its being repugnant to the Constitution, the treaties or laws of the United States,

nor do they involve the validity of any treaty or statute of the United States.

2. They do not involve any substantial federal question, but merely adjudicate questions of fact turning upon the analysis and consideration of voluminous testimony and exhibits, without involvement of any federal question but entirely and adequately based upon well settled non-federal grounds; and

3. The judgments below lack finality as there are presently pending adversary proceedings in the trial court concerning the computation of refunds due appellees.

STATEMENT OF THE CASE.

These are direct appeals from judgments of the Supreme Court of the State of Illinois which reversed judgments of the Circuit Court, Third Judicial Circuit of Illinois, Madison County, and remanded each cause with directions to order, in each case, a refund of taxes paid under protest by the objecting railroad in conformity with the method outlined in two earlier decisions of the Illinois Supreme Court in the **Hillison** and **Kohorst** cases and subject only to the limitations there fixed[1] The final refund orders have not been entered by the trial court although they have been tendered by the railroads.

This litigation involves objections filed by the appellees to the real estate taxes extended against the assessed valuation of their railroad operating property located in Madison County, Illinois, during the period 1957 to 1962, inclusive, pursuant to the remedy recognized by the Illinois Supreme Court in the **Callahan** case and subsequently confirmed in the **C. B. & Q. Railroad Co. Valuation** case.[2] The objections were filed in response to the annual application of the People of the State of Illinois ex rel., the incumbent county treasurer and ex officio county collector of Madison County seeking a judgment for delinquent taxes. The valuation objections of the railroads which are in dispute in the instant cases were based upon a failure of the Department of Revenue to assess and equalize all taxable property in Madison County at its full fair cash value as required by the Illinois Revenue

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[1] A copy of one of the Illinois Supreme Court Judgments is set out in Appellants' Jurisdictional Statement, Appendix "C", p. A-45; see People ex rel. Hillison v. CB&Q RR. Co., 22 Ill. 2d 88, 174 N. E. 2d 175, and People ex rel. Kohorst v. GM&O RR. Co., 22 Ill. 2d 104, 174 N. E. 2d 182.

[2] People ex rel. Callahan v. GM&O RR. Co., 8 Ill. 2d 66, 132 N. E. 2d 544 and CB&Q RR. Co. v. Dept. of Revenue, 17 Ill. 2d 376, 161 N. E. 2d 838.

Act of 1939 as amended, alleging that the operating property of the railroads was annually assessed at its full fair cash value whereas the value of locally assessed property, representing approximately 95% of taxable property in the county, was debased to levels averaging 50% of full value during the years 1957 to 1962. The railroads sought refunds of protested taxes to the extent that the taxes paid exceeded the amount which they would have been required to pay if all property had been assessed and equalized to the level of 100% of full fair cash value as required by statute.

The pending valuation objections of all of the railroads were consolidated for trial and by stipulation entered into by all of the parties, it was agreed that:

> "The said Objectors have each objected to taxes levied upon its railroad property in Madison County, Illinois, for the several years for which their objections are pending and have been consolidated for trial in this proceeding, because of **the alleged unlawful discrimination resulting from the alleged debasement of equalized assessed valuations of locally assessed property in Madison County for each of said years and the alleged equalized assessed valuation of such railroad properties at full fair cash values, and that this consolidated case is to be tried upon said objections,** without said causes being merged and with the maintenance of separate dockets and with separate final orders in all cases at the conclusion of the trial proceedings."

After a lengthy trial and consideration of voluminous testimony and exhibits, the trial court found that locally assessed property had been debased to levels varying from 48.14% to 51.4% during the years in question and that the railroads had likewise been assessed at less than full value but at levels so much higher than local property that it constituted constructive fraud entitling the

railroads to a refund of only a portion of the taxes paid under protest. The judgment order of the trial court expressly reserved jurisdiction of the court to approve the refund computations and implement the process of refund and distribution of the monies in the tax protest fund. The court added "there is no reason for delaying the enforcement or appeal of this order, judgment and decree."[3]

The railroads perfected a direct appeal to the Illinois Supreme Court only with respect to the trial court's determination that their operating properties had been assessed at less than full value. No cross appeal was taken on behalf of the collector and therefore the findings of the trial court regarding the debasement of locally assessed property are now undisputed. The Illinois Supreme Court concluded that the trial court proof established "assessments of the railroads at substantial full value and that the objectors are entitled to the refunds prayed for rather than refunds fixed by the trial court, which in each case was to be computed upon the straight average formulaic result without application of the judgment factor."[4]

STATUTES INVOLVED.

The Constitution of the State of Illinois, 1870, Article IX, Section 1, states in part (Ill. Rev. Stat., 1965, p. 21):

> "The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property—

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[3] The form of findings and judgment order of the trial court are set out in Appellant's Jurisdictional Statement, Appendix B, p. A-87.

[4] People ex rel. Musso v. CB&Q RR. Co., 33 Ill. 2d 88, 102, 210 N. E. 2d 196, 203.

> **such value to be ascertained by some person or persons, to be elected or appointed in such manner as the general assembly shall direct, and not otherwise; * * *"** (Emphasis added).

The Illinois General Assembly has enacted provisions in the Revenue Act of 1939, as amended, to implement the foregoing requirements by delegating to the Department of Revenue the authority and responsibility for assessing railroad operating property and certain other types of property, and for equalizing the assessments of all other real estate and personal property assessed by various local officials. The uniformity provisions of Article IX, Section 1, have been carried out in various sections of the Revenue Act which specifically require that all real estate and personal property, both locally assessed and state assessed, be valued for tax purposes at fair cash value. If local assessing officials fail to assess at full fair cash value, the Department of Revenue is empowered to certify to the county clerk an appropriate multiplier to raise the level of assessment of locally assessed property to 100% of full value.[5]

The method of determining the fair cash value of railroad operating property, except non-carrier real estate, is prescribed in Section 80 of the Revenue Act (Ill. Rev. Stat. 1961, c. 120, par. 561). The Department is required to consider the actual or market value of stock and debt and the net earnings of the company over the preceding five years, "and such other information as the Department may consider as bearing on the fair cash value of the property" (which has included reproduction cost of property having a situs in Illinois together with other matters affecting their judgment of value).

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[5] Ill. Rev. Stat. 1961, c. 120, pars. 501, 502, 561, 612, 627 and 632.

ARGUMENT.

POINT I.

No Question Respecting the Constitutionality of a State Statute and No Federal Statute Is Involved.

As stated in Appellant's Jurisdictional Statement, these appeals merely question whether the action of the Illinois Supreme Court in applying the Illinois laws to the facts in these cases violated provisions of the Fourteenth Amendment to the federal Constitution and no claim is made by Appellant that the state laws *per se* are repugnant to the Constitution or laws of the United States. Thus no grounds exist for direct appeal to this Court under Section 1257 (1) and (2) of the Judicial Code of 1948 [28 U. S. C. A., Sec. 1257 (1) and (2)].

POINT II.

No Substantial Federal Question Is Involved.

The people raise only an evidentiary question.

Despite the fact that the record, exhibits and briefs in these cases are voluminous, there was but one issue on which the Illinois Supreme Court was required to pass:

> "The only issue, therefore, is whether the railroads' properties were assessed at full, fair, cash value for the years in question. This should involve only a question of fact to be viewed in the light of the law as developed and crystallized through a succession of these cases." (People ex rel. Musso v. CB&Q RR. Co., 33 Ill. 2d 88, 90.)

The premises of the People's four jurisdictional questions are (a) arbitrary action by the Court in judicially

finding railroad values through the use of judgment or (b) such arbitrary action by the Department of Revenue which the Court approved, and (c) mandating "complete reliance" on the inflated prices of the post World War II economy in equalizing non-railroad property. The common denominator in each alternative is complete lack of evidentiary support "in the record or elsewhere" for the findings of value. The use of judgment in the railroad evaluation process is repeatedly equated with the elimination or disregard of inflation. The mandatory use of inflated values in equalizing non-railroad property is equated with the official sales-assessment ratio studies.

It is axiomatic that if the record shows the findings were at the full fair cash values and had evidentiary support, the action was not arbitrary and there is here presented no federal question to support certiorari jurisdiction, and in the absence of creditable evidence to the contrary, the presumption of statutory compliance would provide adequate support to a finding of full value.

The appropriate procedures, methods and standards to be followed in determining railroad valuations for purposes of ad valorem taxation in Illinois are strictly State questions and the State Constitution and statute have assigned these functions under statutory guide lines to the Illinois Department of Revenue.

Whether the Department's findings of value in fact represented the full fair cash values of the subject railroad properties required by statute or whether through the use of spurious judgment such valuations were, in fact, reductions from full values are evidentiary questions which the Illinois Supreme Court was competent to decide with finality, unless there was neither presumption nor evidence to support the Court's decision. It is respectfully suggested that only if there is no evidence to

support the findings and creditable evidence against them of a kind and quality sufficient to overcome the presumptions of statutory compliance, should this Court find that inequality or lack of due process are presented by this record.

The task of searching the record for and of analyzing and weighing conflicting competent evidence relating to the forty-six findings of taxable railroad valuations made by the Department upon which the 46 appealed judgment orders of the Illinois Supreme Court are based is not a federal, to say nothing of plenary, problem.

We further respectfully suggest that the record contains a great deal of creditable evidence directly and overwhelmingly establishing that the Department performed its function in good faith and assessed the railroads' properties at their full fair cash valuations. Appellees have filed with the Clerk of this Court nine copies of their principal brief, Reply Brief and motion to strike the People's second brief, which was taken with case.

The analysis of the evidence, contained in Appendices C, F and G, which follows this motion, clearly shows the railroads did not enjoy the benefits of any general inflation during the years of 1957 through 1962.

Appendix D shows the selling prices and the assessed valuations of six railroads which changed hands in the 1949-1961 era. Five of the roads were independent Class I, long-haul railroads. One was a belt line. In all but one of the transactions, the assessment exceeded the selling price. In the single exception, the assessment was 99% of the selling price.

Appendix E shows the comparative influence given reproduction cost in the straight average formula which the Department used in its approaches to findings of taxable railroad valuation, between 1957

and 1962. Reproduction cost would have thus been given an influence under the formula in 1962 in the case of the C&NW of 74.8%, of the Pennsylvania of 75.31% and the New York Central of 72.25%. These percentage figures represent the number of dollars which would have been accorded the reproduction cost indicator of value in the valuation of the railroads if the formulaic results, which the trial Court adopted as the full fair cash value of the properties, were adopted. Graphs illustrating this absurd result from the rigid adherence to the formulaic approach in 1963 are also in the record (Objectors' Exhibits 104A and B, A. V. II, pp. 223, 224).

Appendix H is a table demonstrating that there existed no "hold the line" policy benefiting railroads. This analysis is predicated upon the exhibits of both parties, and the reflected analysis has not been questioned since its submission to the Illinois Supreme Court.

Appendices I and J are graphic portrayals of the fluctuating levels of assessment of all major Class 1 railroads from 1938-1962 and of each of the objecting railroads who here appear. The scale in every instance is that used in People's (Collector's) Exhibit No. 69 (A. V. II, p. 310).

"Part 1, Railroads, Transport Statistics in the United States," for the year ending December 31, 1962, which appears as People's (Collector's) Exhibit 109, clearly indicates that the railroads did not participate in the benefits of the inflation during the subject period, because from 1952 to 1962—

1) Mileage owned and operated by all railroads declined from 222,508 to 215,090 and the mileage of Class I line-haul railroads declined from 212,838 to 205,216. (p. 3)

2) Freight carrying cars owned by Class I line haul railroads declined from 1,758,933 to 1,550,067 (p. 23). It

may be noted that during this period, privately owned freight cars also declined from 274,472 to 269,475 (p. 22). In the Eastern District, which embraces most of Illinois, the decline was from 713,979 to 536,080. (p. 23)

3) In the same period, passenger train miles declined from 34,767 to 24,248 (p. 24) and total passenger cars owned by railroads declined from 17,257 to 11,166. (p. 25)

4) As might be expected, traffic statistics were parallel or had an even greater decline. Total revenue passengers carried (thousands) declined from 469,537 to 311,739 and those carried one mile or more declined 48.97%, from 34,009,986 to 19,902,201. (p. 30)

5) Total freight tonnage (thousands), both carload and LCL, declined from 1,382,604 tons to 1,233,597 tons, only the products of agriculture showing an increase of 16,800 tons in the last year over first of the period. (p. 31). There were 19,826,704,266 freight train, loaded car miles operated in 1952 and only 17,013,664,254 in 1962. (p. 42)

It is obvious that whatever was happening to the remainder of the economy during this period in the general inflationary process following World War II, the railroads were not participants (Col. Exhs. 108 and 109). Had inflation affected railroad valuations, it would have been reflected in the market prices of stocks and bonds and capitalized income.

Cost Was Never Accepted as Reliable.

The People have predicated their entire case, both in the trial and Supreme Courts of Illinois and in this Court, on the hypothesis that cost was a time-honored essential in an even-weighted 3-part equally weighted formula, both historically and under the provisions of the statute, and that by "judgment" only lately applied, cost has been practically eliminated. This is simply not the case. Not only does the statute not require its consideration in the

evaluation process, but the Illinois Tax Commission in determining the procedures for the evaluation of railroads, evolved in the 1933-1937 era, and since followed by both the Commission and the Department, looked askance at reproduction cost as a reliable indicator of railroad value, while recognizing its usefulness in the allocation factor.[6]

The Illinois Tax Commission itself sponsored the Railroad Assessment Act of 1937 (Collector's Exhibits 36, 37 and 38, A. V. II, pp. 283-291). This Act was incorporated in toto and without significant changes in Sections 80 to

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[6] The Commission stated in its 15th Annual Report covering the year 1933 as follows:

> "Primary emphasis, it is believed, should be given to earnings and stock and bond quotations in the valuation process. It is felt that these are a better reflection of the current market value of a railway than original cost. * * *
>
> "Up until the time when valuation appraisals were made by the Interstate Commerce Commission, few railroads had data on original costs. Now such information as they have is based on these appraisals, together with records of additions and betterments to date; **but even these records are far from satisfactory.**
>
> It is almost axiomatic that original costs are no measure of present values. The costs of reproduction have much more relation to actual values, **but if an operating railroad owns numerous useless facilities, the cost of reproduction is far from satisfactory. In an allocation factor in which mileage prorates and earnings data are employed, reproduction values seem to find a logical place. Their use for allocation purposes does not imply that they are being used for the purpose of determining the system values of the railroads in question. These values, as was explained above, are determined on the basis of earnings, stock quotations, and such weighting of physical appraisals as appears necessary to produce satisfactory valuations.** In allocation formulae, however, reproduction values give weight to the presence of facilities within a state." [Ill. Tax Com., 15th Ann. Rep. People's (Collector's) Exh. 34, A. V. II, pp. 281 and 282.]

In mentioning adjustments in the following years, changes in the RPCN (LD) was not mentioned. [Ill. Tax Com., 17 Ann. Rep. People's (Collector's) Exh. 36, A. V. II, p. 283.]

87 of the 1939 Revenue Act and its provisions have from then been in force. There is included in the appendices to this brief the pertinent sections of the Illinois Constitution and the 1939 Revenue Act as in force since its adoption. The 1963 amendments to Sections 80 and 86 (App. D, Jur. St., p. A-50) have no present significance. The important thing is that Section 80 as it now appears and as contained in the 1937 Railroad Assessment Act shows that neither the Illinois Tax Commission nor the legislature considered reproduction cost as an indicator of railroad value which must be considered with income and market indicators, which the railroad assessor is required to consider. Cost is simply one of the items that may be looked at with the 5-year averages of capitalized income and stock and debt, and this was the decision in the **C&NW Valuation** case. (C&NW Ry. Co. v. Dept. of Revenue, 6 Ill. 2d 278) Insofar as the provisions of the Act are concerned, the only required use of the reproduction cost information, as annually reported by the railroad, together with much other information, is as a component of the formula by which the allocation factor is determined for the apportionment of income and stock and debt values. (Chap. 120, §565).

After the adoption of the 1937 Railroad Valuation Act, the Commission again noted that the reduced income and market indicators required a further adjustment of railroad valuations without mentioning cost.[7]

The Commission for the first time in 1940 reported the technical revolution then well advanced in the transporta-

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[7] "Long-continued and increasingly aggravated financial difficulties of the railroad industry, reflected in lowered company earnings and in the market values for stocks and bonds, necessitated the reduction in the full values of their operating properties." [Pp. 15-16, 19th and 20th Annual Reports of the Illinois Tax Commission. People's (Collector's) Exh. 37, A VII, p. 285.]

tion industry and the resulting economic obsolescence of railroad property as a result of the shift of large segments of railroad traffic to other new and expanding forms of transportation. The Commission then observed that it was

> "inevitable that the contraction in the physical plant, the precipitous falling off in earning capacity, and the disposition of investors to discount heavily the prospective earnings of the railroad industry should have made for a more rapid decline in railroad assessments than in the assessment of other types of property."

And discussing the effect of this revolution upon the assessment process, the Commission observed:

> "The elements that enter into the determination of the value of a particular property by an assessment agency are often difficult of analysis. Past earnings, the cost and condition of the property, the imputed value that the stock market places upon securities, general economic tendencies and the level of the previous year's assessment combine with the experience and individual knowledge of members of the Commission to affect their judgment. Mr. Justice Holmes has described the process by which valuations are arrived at: '. . . they express an intuition of experience which outruns analysis and sums up many unnamed, tangled impressions which may lie beneath the consciousness without losing their worth.' * * *
>
> "All through the process of determining an assessment the necessity for utilizing judgment arises, and in the final summary the 'tangled impressions' act directly upon the result. Formula assessments are not mechanical unless rules are developed to cover every possible contingency, a situation which is incapable of attainment." [21st and 22nd Annual Re-

ports of the Illinois Tax Commission, People's (Collector's) Exhibit 38, A. V. II, 288, 289).]

Considering the use of judgment in the valuation of the operating property of a railroad this Court reached the same conclusion as the Illinois Tax Commission:

> "The ascertainment of the value of a railway system is not a matter of arithmetical calculation and is not governed by any fixed and definite rate. Facts of great variety and number, estimates that are exact and those that are approximations, forecasts based on probabilities and contingencies have bearing and properly may be taken into account to guide judgment in determining what is the money equivalent—the actual value—of the property."
>
> Rowley v. Chicago & N. W. R. Co., 293 U. S. 102, 109; Rehearing denied 293 U. S. 632.

It cannot be said, since their own exhibits are to the exact contrary, that the exercise of judgment by an assessor, considering exactly the things to which assessors Danis and Koncel testified they gave consideration, was arbitrary. Nor can it be contended that the recognition by the Illinois Supreme Court of the exercise of judgment as an appropriate lawful final step in the approach to the evaluation of a railroad was unsupported by substantial evidence.

The court did not mandate the following of inflationary trends.

The Department performed its equalization functions upon the facts disclosed by sales—assessment ratio studies. These official ratio studies reflected the level of assessments and equalized assessment of a given county for the year surveyed, and have been found by the Illinois Supreme Court to truly reflect the ratios of assessed and equalized assessments to the full fair cash value and the

opinions in **Hillison, Kohorst** and **Wenzel** describe how they are conducted and show them to be free from criticism as to method and to comply with the statute. No question was raised in the lower Courts as to the method of conducting the official ratio studies or their results, and the People accepted the findings of the trial Court that the levels of assessment for each of the subject years of locally assessed property, after equalization, were those found by the Department.

Undoubtedly, many properties surveyed did increase in value and the sellers participated in the benefits of inflation insofar as the sale prices of their properties were concerned. But, it does not follow that all other properties which sold were thus increased in value, and in any case, it is clear that if the inflated properties had achieved a higher taxable value as a result of the economic circumstances affecting their selling prices, there was nothing arbitrary in the giving of effect to the higher values measured by such sale prices in the equalization process, as the statute required, in determining the county wide level of assessment.[8] The department did not by this procedure mandate complete reliance upon inflated prices. Nor did these studies tend to show that railroads were increasing in value through the inflation which may have affected non-railroad property, and the record shows they did not participate.

Neither Was Railroad Property Arbitrarily Assessed.

Railroad property is centrally assessed by the Illinois Department of Revenue on the "unit" basis. A unit as-

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[8] As to method of conducting the official ratio studies, see *Hillison*, 22 Ill. 2d pp. 96-8; *Kohorst*, 22 Ill. 2d pp. 109-111; *Wenzel*, 28 Ill. 2d pp. 212-16. For standards of value of locally assessed property, see Sections 501 and 502, Chapter 120, Annotated and Ill. Rev. Stat., App. B.

sessment is an evaluation of all the railroads' operating property, including funds involved in operations and all other operating personal property, and, in case of an interstate carrier, its apportionment between Illinois and the other situs states by the application of an Illinois allocation factor. In the approach to an assessment, this allocation factor is applied only to the statutory value indicators of income and market, which the Department is required to consider. These allocated amounts are, in themselves, guides to the assessment and as a further guide are averaged on a ⅓, ⅓, ⅓ basis with I. C. C. reproduced cost less depreciation of the Illinois property of the railroad, adjusted to eliminate uneconomic property and physical obsolescence. Economic obsolescence is not adjusted out of the reproduction cost factor before its use in the formula. The formulaic result is then considered with the statutory factors and with all other information available to the assessor, who then determines by the exercise of judgment based upon his experience what the taxable value, i. e., the assessment, of the railroad is for the subject year. Railroad assessors Danis and Koncel both testified unequivocally that the railroad assessments were at full fair cash value. The reduction from the formulaic result which usually results from the application of the judgment of the assessor is referred to as the "judgment factor". The valuation so determined is distributed by the Department on a pro-rated mileage basis to all of the Illinois taxing districts in which the railroads' operating property is located.

The Illinois Supreme Court has repeatedly found that the method pursued by the Department was not arbitrary and complied with the statute. It could scarcely do otherwise.[9]

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[9] Musso, 33 Ill. 2d 88, 97; Korzen, 32 Ill. 2d 554. In the exercise of his final judgment, the assessor anticipated the future,

The Nature of the Case—Constructive Fraud.

The subject tax objections were based on the Callahan case.[10] **Under Callahan, there resulted constructive fraud**

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paid most attention to earnings, and considered economic obsolescence and many other things, such as, the trends upward and downward of operating income and of stock and debt prices, some based upon observation and others, including current economic conditions. In Illinois, the income and market factors have always been considered more reliable than cost, either investment or reproduction. The principal guide of Raymond S. Danis, as railroad assessor for the years 1933-1960, inclusive, was the capitalized earnings of a railroad, which was historical. Danis' procedures were followed by his successor, railroad assessor Edward F. Koncel (1961-1962) (Danis A 1, pp. 222-3, 228-30, 407-12; Koncel, A 1, 425, 427-430, 433).

See *C&NW Ry. Co. v. Dept. of Revenue,* 6 Ill. 2d 278, 128 N. E. 2d 722; *CB&Q RR. Co. v. Dept. of Revenue,* 17 Ill. 2d 376, 161 N. E. 2d 838. And see People's (Collector's) Exhibit 34, A. V. II, pp. 281-2 and 1959 testimony of Raymond S. Danis in previous Madison County tax cases. He was then railroad assessor and a witness for the People, A. V. I, pp. 402-415. Danis testified again in Lee County in 1960 while the incumbent assessor, as adverse witness to the railroads, A. V. I, pp. 281-291. After retirement, Danis was a witness in this case, A. V. I, pp. 218-235. Edward F. Koncel testified as Court's witness in the case while the incumbent railroad assessor, A. V. I, pp. 415-441.

[10] *People ex rel. Callahan v. GM&O RR. Co.,* 8 Ill. 2d 66, was the first tax objection case considered by any Illinois Court after the effective date (1-1-46) of the full value (Butler) Reform Legislation of 1945. In this case the GM&O objected to 45% of the taxes levied upon its property in Madison County for the year 1951 claiming it had been assessed at full fair cash value as the statute required while other property subjected to the same taxes in Madison County had been assessed that year at not to exceed 55% of full fair cash value as the law required. The railroad sought to be refunded the difference between the amount of tax extended against its property and what the tax would have been had the tax base included locally assessed property at 100% of the full statutory standard. This was in effect a new remedy and based upon the statute as amended in 1945. The Illinois Supreme Court held the objection to be appropriate, but the particular form to be technically objectionable. Subsequently, other similar objections to taxes levied for the years 1952-1957, inclusive, in Madison County were amended or pleaded to meet the technical objection of the Court in *Callahan,* and were consolidated and tried, vigorously and comprehensively, over a 16 months period. These objections were sustained and the final orders, all in similar

as a matter of Illinois law, without regard to any provision of the Illinois or federal Constitutions. It evolved as a remedy for the beleaguered taxpayer to whom the 1945 full valuation reform legislation had been faithfully applied while other taxpayers had not been similarly affected. From these facts constructive fraud was irrebutably presumed.

It is significant that in none of the cases in which relief was granted upon the basis of **Callahan** does the Court find that, by the relief granted, it is achieving uniformity under the Constitution of Illinois or due process or equal protection under the 14th Amendment.

In the **Burlington Valuation** case, 17 Ill. 2d 376, the railroad sought to compel the Department to exercise its constitutional duty to secure uniformity in the assessment and equalization of the 1957 assessment of the railroad. The Supreme Court held that "with the enactment of the Butler amendments to the Revenue Act in 1945, the General Assembly required that all valuations upon which tax rates are extended must be at full, fair cash value. It is the duty of the Department to carry out the statutory mandate". The Court then referred the railroad to **Callahan** as providing an appropriate remedy for the recovery of any excess taxation due to the gross discrimination complained of by the railroad.

While several of the Objectors linked their rights to relief under **Callahan** with their right to be protected by the 14th Amendment and uniformity clause of the State Constitution, the facts alleged and the relief prayed in every instance were the same in substance as the Illinois Supreme Court had approved in **Callahan.** The railroads in all proceedings in the trial Court and on appeal pro-

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form, were entered on November 3, 1959. (See Objectors' Exhibits 46, 46A-E, A. V. II, pp. 143-159.)

ceeded upon the simple issue of constructive fraud. (A. V. I., pp. 4-7, 47-8, 66-7, 71.)

It follows that, so far as the remedy is concerned, this case does not draw in question the validity of any Illinois statute on the grounds of its being repugnant to the Constitution, nor does the remedy involve a single substantial federal question. It is entirely and adequately based upon well-settled non-federal grounds, namely, the provisions of the 1939 Revenue Act of the State of Illinois, as amended in 1945, requiring the assessment and equalization of railroad and of all other property at full fair cash value, and specifying the means for equalizing locally assessed property at that value, and the subsequent violation of the statute in the assessment and equalization of locally assessed property at less than 50% of statutory standard, and the resultant constructive fraud.

Public Importance Greatly Exaggerated.

Counsel for the People, without documentation, have claimed a great public interest impels the acceptance of this case upon a "probable jurisdiction" basis (Jur. St. at pp. 20-21, 37-41). The Appellees have presented valuation objections similar to those in the case at bar in more than half of the 102 Illinois counties. The amounts involved in Cook County for the railroads located there more than equal the total valuation objections in all other counties, including Madison. Based on **Korzen**, the Cook County objections have now been finally disposed of, or are awaiting submission of orders making final disposition. Based on **Callahan, Hillison, Kohorst, Wenzel** and **Enrietta**, most of the other valuation objections of Appellees have also been disposed of in the Counties of Illinois other than Cook.[11]

[11] CB&Q, total counties in which objections filed 45, objections disposed of 43, still pending, 2; and similarly, C&NW, 30, 26, 4;

POINT III.

The Judgments Appealed Lack Finality.

A fundamental prerequisite to a review by this Court of a state court decision either on appeal or by writ of certiorari under the provisions of Section 1257 of the Judicial Code of 1948 (28 U. S. C. A., Sec. 1257), is that the judgment to be reviewed be final and the litigation concluded in the court of first instance.

The trial court originally reserved jurisdiction to approve the refund calculations and the mandates of the Supreme Court of Illinois direct that further orders be entered by the trial court awarding refunds to the objectors in conformity with the method outlined in the **Hillison** and **Kohorst** cases previously decided by that court. To carry out the mandates requires more than a mere arithmetical calculation of the excess taxes and is not just a ministerial task such as an accounting. On November 2, 1965, the railroads filed motions requesting the Circuit Court of Madison County to enter the final orders as directed, and have tendered proposed settlement orders which have not been entered as of the date of this writing. A substantial and fundamental dispute between the parties has existed from the outset of this litigation regarding the proper method to be used in determining the amounts of protested taxes to be refunded and the

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GM&O, 25, 21, 4; C&EI, 23, 20, 3; I. C., 53, 50, 3; N. Y. C., 32, 29, 3; N. Y., Chicago & St. L., 17, 10, 7; Pa., 17, 15, 2; Wabash, 23, 18, 5; Ill. Term. 10, 8, 2; TRRA, 2 1, 1; A&S, 2, 1, 1.

In some of the counties where objections are still pending, the earlier years had been disposed of and the objections pend only for one or more of the last years in the period. Only the C&NW has valuation objections pending to 1963 taxes, and this objection is *pro forma* based upon a 30% reduction by the Department of Revenue in the 1963 assessed valuation, prior to equalization, as provided by the 1963 Amendment to Sections 80 and 86 of Revenue Act. See App. D, Jur. St. p. A-50. This objection is undisposed of in only 3 counties.

opinions in the **Kohorst** and **Hillison** cases are not sufficiently specific to enable the trial court to carry out the mandates without the exercise of judicial discretion.[12] The collector contends that the revised tax to be charged the railroads in each taxing district should be computed by dividing the amount levied by the adjusted full valuation, whereas the railroads argue that the **Kohorst** and **Hillison** cases require use of the amount actually extended, which, in most instances, is considerably less than the levy as the result of maximum tax rate limits. The proposed levy theory involves a hypothetical recast of the tax bill of all taxpayers in each taxing district, but such revised bill can only be enforced against the railroad objectors since the taxes extended against the other taxpayers may not now be altered. The relief granted the railroads by the Illinois Supreme Court will be defeated in many of the taxing districts where the rate needed to produce the amount of the levy will equal or exceed the rate originally extended thereby creating a new discrimination against railroad property. The railroads will also be deprived of an opportunity to raise objections to the recast tax bills in violation of due process and equal protection of the laws. Considering the issues involved in this dispute, a federal question may evolve if the trial court accepts the "levy" theory and further appeals to the Illinois Supreme Court and possibly this court will ensue.[13]

This court has said (**Republic Natural Gas Co. v. Oklahoma**, 334 U. S. 62, 68, 98 L. ed. 1212, 1219):

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[12] In People ex rel. Kohorst v. GM&O RR. Co., 22 Ill. 2d 104, 112, 174 N. E. 2d 182, the measure of recovery is stated to be "the difference between the amount of taxes **extended** against the objectors and the amount which would have been **extended** had the locally assessed property been equalized at 100% full, fair cash value." (Emphasis added.)

[13] Nine copies of one of the records of proceedings in the trial court since the filing of the mandates have been filed with the clerk of this court.

"the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up—for example, where liability has been determined and all that needs to be adjudicated is the amount of damages. Bruce v. Tobin, 245 U. S. 18, 62 L. ed. 123, 38 S. Ct. 7; Martinez v. International Bkg. Corp., 220 U. S. 214, 223, 55 L. ed. 438, 443, 31 S. Ct. 408; Mississippi C. R. Co. v. Smith, 295 U. S. 718, 79 L. ed. 1673, 55 S. Ct. 830."

There has been no final, effective determination of this litigation in the state courts. In furtherance of good judicial administration, a fragmentary review of these cases should be avoided by dismissing the appeals for want of finality.

CONCLUSION.

It is respectfully submitted that this Court "will not undertake to review what the lower Court did not decide." **Walters v. St. Louis** (1954), 347 U. S. 231, 233, 98 L. Ed. 660, 74 S. Ct. 505.

The constitutional questions hypothecated by counsel were not the subject of nor involved in the opinion of the Illinois Supreme Court. These cases are founded upon the 1939 Revenue Act of Illinois and arise from tax objections filed under that act founded upon constructive fraud resulting as a matter of Illinois law from the violation of that act by the Department in the equalization of locally assessed property.

The only issue reviewed by the Illinois Supreme Court was the assessment of railroad operating property at full value, an evidentiary matter, adequately supported by the record, and concluded favorably to railroad objectors. It

seems apparent that no federal question is involved and that the judgments below are lacking in the finality required to support the jurisdiction of this Court.

Wherefore, Appellees in this Court respectfully pray that this appeal be dismissed or that the judgment of the Supreme Court of the State of Illinois be affirmed.

Respectfully submitted,

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